though it belonged originally to the parent, is transferred to the minor. Hence the parent has nothing upon which to base a subsequent suit. This theory does not appear to have met with great favor, but is supported by a few courts. See *Gooden* v. *Rayl et al.,* 85 Iowa 592, 52 N. W. 506; *Abeles* v. *Bransfield,* 19 Kans. 16. Other courts proceed upon the theory of estoppel. It is true as a general rule that a party to a suit is bound only in the capacity in which he appears. Therefore an action by a parent for the loss of services of his minor child, is not barred by the *mere* fact that the child by her parent or next friend has already recovered damages for the same injury. *Milton* v. *Middlesex Ry Co.* 125 Mass. 130; *Texas & P. Ry.* v. *Morin,* 66 Tex. 133, 18 S. W. 345. But a plea of res adjudicata, which shows that the party sought to be estopped in his individual capacity had sued in the former case in the character of guardian or next friend is as a plea a bar, if it also shows that the merits of the case, as to such party individually were in some way involved in the issues and determined by the prior judgment. BLACK, JUDGMENTS (2nd ed.) § 536 ff; *Gernstein* v. *Fisher,* 12 Misc. Rep. 211, 33 N. Y. Supp. 1120; *Furlong* v. *Banta,* 80 Hun 248. The "merits of the case" as to the parent individually, are necessarily involved if he sues as next friend for his minor child and permits the latter to recover for loss of services. *Baker* v. *Flint, etc., R. R. Co.,* 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471, and cases there cited.

MASTER AND SERVANT—LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT—FELLOW-SERVANTS—DUTY OF MASTER TO WARN AND INSTRUCT SERVANT WHEN SET AT DANGEROUS WORK.—Plaintiff was employed by defendant as a common laborer in an open slate quarry, working under a gang boss, chiefly about the hoisting engine, in loading boxes, etc. He was not an experienced quarryman and had never had anything to do with blasting. Three blasts had been put in and attempts to explode them by electricity had failed. Some of the men with the gang boss then went down and the boss set plaintiff to dig the tamping out of one of the holes with a crowbar, and while so engaged the blast exploded injuring plaintiff. Plaintiff had never done such work and the evidence showed that it had never before been done in the quarry while he was employed there. He was given no warning of the danger and no instruction except to pour water in the hole as he worked. There was expert testimony that the drilling out of unexploded charges was highly dangerous, and in the proper conduct of the work should never be done, and also testimony that it was contrary to the orders of the defendant's superintendent, but such orders were not shown to have been known by plaintiff. *Held,* that the negligence of the gang boss was imputable to defendant and that the question of its liability for the injury was properly submitted to the jury. *Peters et al.* v. *George* (1907), — C. C. A. 3rd Cir. —, 154 Fed. Rep. 634.

The case is of interest on account of the principles upon which it was decided and their application to this state of facts. The fellow-servant rule that where a master uses due diligence in the selection of competent and trusty servants and furnishes them with suitable means to perform the services in which he employs them he is not answerable to one of them for an

injury received by him in consequence of the carelessness of another while both are engaged in the same service, has its great example in *Farwell* v. *Boston, etc., R. R. Co.,* 4 Metc. 49, in which an engineer employed by the railroad company was injured by the negligence of the switch-tender and the company was held not liable. An important and universally accepted restriction of the fellow-servant rule is what is known as the "vice-principal limitation," a vice-principal being a servant who represents the master in the discharge of those personal or absolute duties which every master owes to his servant. The leading example of the vice-principal rule as established in the federal courts in the case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross,* 112 U. S. 377, the facts of which were that P., an engineer of a freight train, sustained injuries by collision with a gravel train through the negligence of the conductor of the freight train. It was held that the conductor was not a fellow servant with the fireman, the brakeman, the porters and the engineer, that he stood in the relation of vice-principal to the plaintiff, and that the company was liable. Justices BRADLEY, MATTHEWS, GRAY and BLATCHFORD dissented on the ground that the conductor was a fellow-servant with the other employes of the train. The case of *Baltimore and Ohio Railroad Co.* v. *Baugh,* 149 U. S. Rep. 368, marks the discarding of the so-called theory of vice-principal in the federal courts and the making the question whether the negligence charged is the neglect of a primary absolute duty of the master to the servant the essential one. The character of the act rather than the relation of the employes to each other is to be chiefly considered. In that case the company was held not liable for the injuries to the defendant, a fireman, through the negligence of the engineer of the locomotive. Mr. Justice FIELD dissented on the ground that the engineer was a vice-principal under the facts of the case, and that the company was liable. Mr. Chief Justice FULLER dissented on the ground that the rule laid down in *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross,* governed the case. In the present case Judge GRAY follows the reasoning of Justice BREWER in *Baltimore & Ohio Railway Co.* v. *Baugh,* and holds that there was an absolute and personal duty as shown from the character of the act upon the employer to explain the dangerous character of the act to the employe, and that the employer is not discharged by merely entrusting its performance to a subordinate.

MECHANICS' LIEN—LEASEHOLD ESTATE.—One Crutcher erected a building upon certain real property in which he had a leasehold estate. Plaintiff (defendant in error here) had purchased materials for the construction of this building, and, not being paid therefor, obtained a materialman's lien under the statute (§ 4817, WILSONS REV. & AM. ST. OKL., 1903), providing, "Any person who shall, under contract with the *owner* of any tract * * * of land * * * furnish material for the erection * * * of any building * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances * * * for the amount due him for said labor, materials, etc." Defendant Crutcher objected that his interest in the land was insufficient to support a mechanic's lien. *Held,* that a leasehold